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Being Persuaded to Sleep with Someone in Order to Have a Place to Sleep: The Eleventh Circuit's Analysis of Sexual Harassment Claims Under the Fair Housing Act

Stella Preston*

I. INTRODUCTION

One of the fundamental ideals the United States was built upon is that its citizens must have their rights and freedoms protected. Historically, however, there have been numerous groups of individuals who have had their civil rights infringed upon, and what is worse, not protected by the legal and political institutions of the country. What the United States is experiencing now is an increase in the widespread fight for those who have historically been discriminated against in one way or another. Citizens these days seem less apt to sit back and silently let injustices go on without any repercussions. In particular, one social fight of importance is the fight for those who have been victims of sexual assault or sexual misconduct.¹

*I would like to first extend my deepest gratitude to Professor David Ritchie for his invaluable guidance throughout this writing process. I would also like to thank my parents for their constant love and support, and for always believing in me and my abilities no matter what. Finally, I want to express how thankful I am for my fellow Law Review members for their support along the way. I could not have done this without you!

1. Jocelyn Noveck and MaryClaire Dale, *#MeToo, 4 years in: 'I'd like to think now, we are believed'*, ASSOCIATED PRESS (October 15, 2021), [https://www.westlaw.com/Document/Idc331ef02d8911ec86c3db30f5ade17c/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/Document/Idc331ef02d8911ec86c3db30f5ade17c/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0). The #MeToo movement started gaining notoriety a few years ago. The movement aims at empowering women to come forward about their stories of sexual misconduct or harassment they have been subjected to, specifically at the hands of men in powerful positions.

All around the country, more and more men and women are coming forward about their experiences as victims of sexual assault in hopes that it sparks real change. In fact, according to a poll conducted by The Associated Press-NORC Center for Public Affairs research, about half of Americans (54%) say they are now more likely to speak out if they become a victim of sexual misconduct or assault.² Specifically, within the housing industry, instances of sexual misconduct have garnered heightened attention and have warranted fundamental changes to be made.³

Fox v. Gaines,⁴ decided by the United States Court of Appeals for the Eleventh Circuit, highlights the importance of protecting individuals from sexual assault or sexual harassment in any aspect of life. The holding in *Fox* allows men and women to seek redress for quid pro quo and hostile housing environment sexual harassment they may encounter in the housing context.⁵ By using a similar interpretation to that of Title VII of the Civil Rights Act of 1968,⁶ the court held, as a matter of first impression, that sexual harassment qualifies as sex discrimination under the federal Fair Housing Act (FHA),⁷ joining four of its sister circuits around the United States.⁸

II. FACTUAL BACKGROUND

While searching for a new apartment for her and her child, Ms. Fox visited the Rose Bush Apartments in Jupiter, Florida, owned by Ms. Lucille Gaines and managed by Mr. Dana Gaines.⁹ From the time that she applied for the unit, Mr. Gaines made Ms. Fox feel uncomfortable and unsettled, making inappropriate comments about her looks. Mr. Gaines even went so far as to barter with Ms. Fox for a kiss.¹⁰ He told

2. Noveck and Dale, *supra* note 1.

3. Cecily Fuhr, Annotation, *Cause of Action by Tenant Against Landlord for Sexual Harassment*, 93 C.O.A.2d 679 § 2 (2020).

[B]etween the launch of the Department of Justice's Sexual Harassment in Housing Initiative in 2017 and the time of writing, the DOJ has filed 11 lawsuits alleging a pattern or practice of sexual harassment in housing, filed or settled 15 sexual harassment cases, and recovered over \$2.6 million for victims of sexual harassment in housing.

4. 4 F.4th 1293 (11th Cir. 2021).

5. *Id.* at 1297.

6. 42 U.S.C. § 2000e-2 (2021).

7. 42 U.S.C. § 3604 (2021).

8. *Fox*, 4 F.4th at 1295.

9. *Id.* at 1294 n. 2. There is no indication in the record whether Lucille and Dana are related or not, but practically, it does not matter here.

10. *Id.* at 1294.

her, “[H]e had a list of people interested in the unit but would ‘keep it available for her if she would give him a kiss.’”¹¹ Although Mr. Gaines’s actions and comments made Ms. Fox feel uneasy about renting the apartment, she knew she needed it. After signing the lease and getting the keys, Mr. Gaines reminded Ms. Fox about the kiss; she felt trapped and as if she had no other choice, so she eventually kissed him.¹²

After paying the security deposit, as well as first and last months’ rent, Ms. Fox had a hard time making the full monthly rent payments for her apartment. In response to this, Mr. Gaines proposed helping Ms. Fox with her rent in exchange for her providing him with sexual favors. Ms. Fox ultimately gave in to Mr. Gaines’s offer, and their arrangement went on for about three and a half years.¹³ Mr. Gaines lowered Ms. Fox’s rent as long as she gave him sexual favors.¹⁴

In addition to their arrangement, Mr. Gaines started monitoring Ms. Fox and questioning her whereabouts, began demanding Ms. Fox not invite men to her apartment, and installed surveillance cameras facing in the direction of her unit so he could track her daily activities.¹⁵ Ms. Fox wanted “[T]o stop Mr. Gaines’s ‘controlling and harassing behavior,’ [so she] ended her sexual relationship with him.”¹⁶ But in response, Mr. Gaines began threatening Ms. Fox with eviction and giving her fraudulent notices of violations.¹⁷ The next week, Ms. Fox paid the same reduced rent payment she had been making for the past three and a half years and told Mr. Gaines that she would pay the rest within the next eight days. However, even though Ms. Fox made good on her promise and paid the remainder eight days later, Mr. Gaines told her that he had to file an eviction proceeding on her because she did not pay it within seven days. Mr. Gaines tried serving Ms. Fox with a three-day notice to vacate the apartment and, even after mutually agreeing that Ms. Fox would move out by midnight on the last day of the month, he

11. *Id.* (quoting Second Amended Complaint at 6, *Fox v. Gaines*, No. 9:19-cv-81620-AHS, (S.D. Fla. March 16, 2020), ECF No. 39).

12. *Id.* at 1294.

13. Ms. Fox paid between \$400 and \$600 for rent most months, and Mr. Gaines would cover the difference. Second Amended Complaint at 7, *Fox v. Gaines*, No. 9:19-cv-81620-AHS, (S.D. Fla. March 16, 2020), ECF No. 39.

14. *Id.*

15. *Id.*

16. *Fox*, 4 F.4th at 1294 (quoting Second Amended Complaint at 7, *Fox v. Gaines*, No. 9:19-cv-81620-AHS, (S.D. Fla. March 16, 2020), ECF No. 39).

17. *Id.* Many of these fraudulent violation notices claimed that Ms. Fox needed to clean up the area around her apartment. Exhibit C, *Fox v. Gaines*, No. 9:19-cv-81620-AHS, (S.D. Fla. January 18, 2020), ECF No. 25.

called the police during the last day of the month and tried having Ms. Fox arrested for trespassing.¹⁸

After being forced to vacate her apartment, Ms. Fox sued both Dana and Lucille Gaines, “arguing that Mr. Gaines’s sexual harassment of her violated the FHA’s and Florida FHA’s prohibitions on sex discrimination.”¹⁹ The case at hand was first heard in the United States District Court for the Southern District of Florida, but both Mr. and Ms. Gaines’s motions to dismiss were granted.²⁰ The court noted that, while “Ms. Fox had ‘sufficiently pled “severe, pervasive harassment”’ that was ‘well beyond what was required to withstand a motion to dismiss,’”²¹ her sexual harassment claim ultimately was not actionable under the FHA. This decision was guided by the court’s conclusion that the plain language of the statute did not allow for a claim of sexual harassment.²²

Ms. Fox appealed the dismissal of her claims. The appeal brought this question of first impression to the United States Court of Appeals for the Eleventh Circuit, finally allowing the court to address and rule on the issue.²³ The Eleventh Circuit held that sexual harassment “is actionable under the FHA, provided the plaintiff demonstrates that she would not have been harassed but for her sex.”²⁴ Ultimately, the dismissal was vacated, and the case was remanded to the district court for further proceedings.²⁵

III. LEGAL BACKGROUND

A. *The Fair Housing Act of 1968*

The Fair Housing Act is the common name given to Title VIII of the Civil Rights Act of 1968.²⁶ The main purpose of this federal statute is to prohibit discrimination in the sale and rental of housing, as well as other housing-related transactions, based on race, color, national origin, religion, sex, familial status, and disability.²⁷ In relation to sex

18. *Fox*, 4 F.4th at 1294–95.

19. *Id.* at 1295.

20. *Id.*

21. *Id.* (quoting Order on Motion to Dismiss at 4–5, *Fox v. Gaines*, No. 9:19-cv-81620-AHS, (S.D. Fla. June 19, 2020), ECF No. 51).

22. *Id.*

23. *Id.*

24. *Id.* at 1297.

25. *Id.*

26. Lora A. Lucero, Annotation, *Fair Housing Act (42 U.S.C.A. §§ 3601 et. seq.)—Supreme Court Cases*, 30 A.L.R. Fed. 3d Art. 3, 2 (2018).

27. *Id.*

discrimination, some of these prohibitions include, but are not limited to, the refusal to rent or sell, or negotiate to rent or sell, because of sex; discriminating in the terms, conditions, or privileges of a sale or rental because of sex; and showing any preference of sex in the advertising of a sale or rental.²⁸ The FHA was passed and enacted by Congress in the midst of the civil rights movement, with the hope of providing fair housing throughout the country for all races and other historically disadvantaged groups, including women.²⁹

Since its enactment, causes of actions under the FHA have been raised many times by individuals looking to recover for the unfair sales or rental practices of landlords. However, it took some time for individuals to bring cases under the FHA for discrimination stemming from sexual harassment, or from creating a hostile or offensive sexual environment. The two main types of sexual harassment cases that have since been brought under the FHA are quid pro quo sexual harassment and the creation of a hostile housing environment.³⁰ Quid pro quo sexual harassment occurs when one offers or provides the other some kind of benefit in exchange for sexual favors. Hostile environment sexual harassment occurs when the sexual harassment is so pervasive and severe that it changes the conditions of the housing arrangement.³¹

One of the first cases to discuss the issue of sexual harassment in the housing environment was *Shellhammer v. Lewallen*,³² which, although the plaintiffs did not carry their burden in pleading their claim for it, nonetheless paved the way for a claim of sexual harassment being actionable under the FHA if it creates an offensive environment for the renter.³³ The plaintiffs in this case, a husband and wife who were renters of an apartment owned by the defendants, presented two different legal claims: (1) that the landlord's sexual harassment of the wife created an offensive environment for their tenancy; and (2) that their landlords made their tenancy subject to sexual consideration.³⁴ The United States District Court for the Northern District of Ohio found that the plaintiffs had factually proven the second claim (the plaintiffs were evicted shortly after the wife refused sexual advances

28. David J. Stephenson, Jr., Annotation, *Actions Under Fair Housing Act (42 U.S.C.A. §§ 3601 et seq.)*, Based on *Sexual Harassment or Creation of Hostile Environment*, 144 A.L.R. Fed. 595, 1 (1988).

29. Lucero, *supra* note 26, at 3.

30. Stephenson, Jr., *supra* note 28 at 6.

31. *Id.*

32. 770 F.2d 167 (6th Cir. 1985).

33. *Id.* at 3–4.

34. *Id.* at 3.

from the landlord), but did not meet their burden of proof for the first claim. They found that the wife:

[P]oints to two requests during the three to four months of her tenancy. This does not amount to the pervasive and persistent conduct which is a predicate to finding that the sexual harassment created a burdensome situation which caused the tenancy to be significantly less desirable than it would have been had the harassment not occurred.³⁵

So, while the plaintiffs in that case did not prevail on their claim that the sexual harassment by their landlord created a hostile or offensive housing environment, the court established the possibility of this claim being adjudicated in the future.

B. Title VII of the Civil Rights Act of 1968

In order to understand how the FHA's provision prohibiting sex discrimination has been translated to prohibiting sexual harassment, it is important to understand sexual harassment claims under Title VII of the Civil Rights Act of 1968 (Title VII), which prohibits, among other things, sex discrimination in the workplace. In *Meritor Savings Bank, FSB, v. Vinson*,³⁶ the Supreme Court of the United States held that a claim for sexual harassment, amounting to a hostile environment at work, is a form of sex discrimination and is therefore actionable under Title VII.³⁷ When a supervisor, or someone in a superior position, "sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex."³⁸ *Meritor* was a landmark case in that it established a cause of action for sexual harassment in the workplace under Title VII. It also established the idea that Title VII's language prohibiting sex discrimination was not limited to just sexual harassment creating economic or tangible injury, but sexual harassment leading to noneconomic injury as well.³⁹

The provisions of Title VII with language prohibiting discrimination on the basis of sex have been interpreted and analyzed similarly to those in the FHA when it comes to sexual harassment claims. In fact, many courts over time "have recognized that Title VIII is the functional equivalent of Title VII, . . . and so the provisions of these two statutes

35. *Id.* at 4 (quoting the magistrate from the United States District Court for the Northern District of Ohio).

36. 477 U.S. 57 (1986).

37. *Id.* at 73.

38. *Id.* at 64.

39. *Id.* at 64-65.

are given like construction and application.”⁴⁰ In the case discussed above, *Shellhammer*, the United States Court of Appeals for the Sixth Circuit mentioned that the lower court analogized the plaintiff’s claims (sexual harassment creating a hostile housing environment) to similar actions brought under Title VII, citing *Henson v. City of Dundee*⁴¹ in its analysis.⁴²

Further, in *DiCenso v. Cisneros*,⁴³ the United States Court of Appeals for the Seventh Circuit incorporated Title VII doctrines into its analysis of the plaintiff’s claim of sexual harassment amounting to a hostile environment, violating the FHA.⁴⁴ For example, for one to bring a sexual harassment cause of action under Title VII, “it must be sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”⁴⁵ The Seventh Circuit then applied this principle to discrimination within the housing context, saying that a claim for sexual harassment under the FHA is actionable if it unreasonably interferes with the use and enjoyment of their premises or property.⁴⁶ The court also emphasized the importance of looking at the totality of the circumstances surrounding the claim: namely, the frequency of the alleged discrimination and its severity; if it is physically threatening or humiliating, or just an offensive statement; and whether it interferes with the tenant’s housing environment.⁴⁷ The Seventh Circuit has repeatedly held that “isolated and innocuous incidents” are not enough to support a claim for sexual harassment.⁴⁸ The court emphasizes the importance of looking at the frequency of the abusive or harassing behavior.⁴⁹

40. *Kyles v. J.K. Guardian Sec. Services, Inc.*, 222 F.3d 289, 295 (7th Cir. 2000) (citations omitted).

41. 682 F.2d 897 (11th Cir. 1982).

42. *Shellhammer*, 770 F.2d 167 at 3–4.

43. 96 F.3d 1004 (7th Cir. 1996).

44. *Id.* at 1008.

45. *Id.* (citing *Meritor*, 477 U.S. at 67).

46. *Id.* (quoting *Honce v. Vigil*, 1 F.3d 1085, 1090 (10th Cir. 1993)).

47. *Id.*

48. *Id.*

49. *Id.* However, the court ends by noting that its holding does not necessarily mean that a single incident of harassment will never be enough support for an actionable claim. But, in this case, it was not. *Id.* at 1009.

C. The Florida Fair Housing Act

The Florida federal FHA⁵⁰ was enacted to provide fair housing throughout the entire state of Florida and is virtually identical to that of the FHA. The applicable sections of both statutes even have the same title: “Discrimination in the sale or rental of housing and other prohibited practices.”⁵¹ Both statutes contain the same provisions regarding the prohibition of sex discrimination in the sale and rental of housing, and courts have interpreted, analyzed, and applied it in the same way as the FHA.⁵² In *Loren v. Sasser*, the Eleventh Circuit used 28 U.S.C. § 1367(a), allowing “supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy,” to support their analysis that the Florida FHA and the federal FHA are statutorily the same and should be interpreted identically.⁵³

Further, in *Bhogaita v. Altamonte Heights Condominium Association, Inc.*, the court noted that “[t]he FHA and the Florida Fair Housing Act are substantively identical, and therefore the same legal analysis applies to each.”⁵⁴ Thus, courts faced with the task of evaluating a claim under the Florida FHA will look to the federal FHA for guidance.

D. Sister Circuits’ Take on Sexual Harassment Claims under the FHA

Every United States Circuit Court of Appeals which has addressed the question of whether the FHA provides a cause of action for sexual harassment in the housing environment has answered in the affirmative.⁵⁵ One of the earliest circuits to look at and adopt this rule was the Tenth Circuit. In *Honce v. Vigil*, the court analogized sexual harassment claims under the FHA to those in the workplace.⁵⁶ Ultimately, the court held that a claim for sexual harassment is actionable when it creates a hostile housing environment, and

50. Fla. Stat. Ann. § 760.23 (2020).

51. 42 U.S.C.S. § 3604; Fla. Stat. Ann. § 760.23.

52. *Bhogaita v. Altamonte Heights Condominium Ass’n, Inc.*, 765 F.3d 1277, 1285 (11th Cir. 2014) (citing *Loren v. Sasser*, 309 F.3d 1296, 1299 n.9 (11th Cir. 2002)).

53. *Loren*, 309 F.3d at 1299 n.9 (citing 28 U.S.C. § 1367(a)(2021)).

54. *Bhogaita*, 765 F.3d at 1285. See also *Philippeaux v. Apartment Inv. and Management Co.*, 598 F. App’x. 640, 643–44 (11th Cir. 2015); *Noah v. Assor*, 379 F. Supp. 3d 1284, 1295 (S.D. Fla. 2019). The Florida FHA is the state counterpart to the federal FHA.

55. *Fox*, 4 F.4th at 1295 n.5.

56. *Honce*, 1 F.3d at 1088.

“unreasonably interferes with use and enjoyment of the premises.”⁵⁷ In 2010, the Eighth Circuit affirmed and further held that claims for sexual harassment causing a hostile housing environment, and quid pro quo sexual harassment claims, are actionable under the FHA.⁵⁸ The court noted that quid pro quo sexual harassment in this context happens “when housing benefits are explicitly or implicitly conditioned on sexual favors.”⁵⁹

As mentioned above, the Seventh Circuit has also adopted the principle that a hostile housing environment sexual harassment claim is actionable under the FHA.⁶⁰ Furthermore, in an unpublished opinion, the Ninth Circuit recognized a cause of action for sexual harassment under the FHA by analyzing it the same way as a Title VII claim for sexual harassment.⁶¹ The court noted that, in similar fashion to a Title VII claim, it determines “whether an environment is sufficiently hostile or abusive by ‘looking at all the circumstances, including frequency of the discriminatory conduct; its severity; whether it is physically threatening, or humiliating or a mere offensive utterance; and whether it unreasonably interferes with’ . . . a tenant’s living conditions.”⁶²

E. Eleventh Circuit’s History of Interpretation of the FHA as Applied to Sexual Harassment

The Eleventh Circuit’s history of addressing the FHA’s coverage of sexual harassment claims in the housing environment is minute. A claim for sexual harassment under the FHA was brought to the circuit’s attention in 2012 in *Tagliaferri v. Winter Park Housing Authority*.⁶³ The court reasoned that, although it had yet to address whether sexual harassment was actionable under the FHA, it did not need to at that time. Both parties agreed that to bring a claim for sexual harassment under the FHA, it had to be severe and pervasive enough to amount to sexual harassment claims brought as employment discrimination.⁶⁴ Given the specific facts of *Tagliaferri*, the court easily determined that

57. *Id.* at 1090.

58. *Quigley v. Winter*, 598 F.3d 938, 946, 947 (8th Cir. 2010).

59. *Id.* at 947 (quoting *Honce*, 1 F.3d at 1089).

60. *DiCenso*, 96 F.3d at 1008.

61. *Hall v. Meadowood Ltd P’ship*, 7 F. App’x 687, 689 (9th Cir. 2001).

62. *Id.* (quoting *Kortan v. California Youth Authority*, 217 F.3d 1104, 1110 (9th Cir. 2000)).

63. 486 F. App’x 771 (11th Cir. 2012).

64. *Id.* at 774.

the standard of severe and pervasive was not met, so it declined to assess the claim further.⁶⁵

IV. COURT'S RATIONALE

The question whether sexual harassment can be brought as a claim for sex discrimination under the FHA was one of first impression for the Eleventh Circuit in *Fox*.⁶⁶ The court applied a *de novo* standard of review to the district court's order granting the defendant's motion to dismiss for failure to state a claim, as well as the district court's interpretation of the FHA statute.⁶⁷ With this standard of review, the court accepted "the complaint's allegations as true and constru[ed] them in the light most favorable to the plaintiff."⁶⁸

A. Court's Discussion of the Federal FHA

The Eleventh Circuit opinion, issued by Judge Jill Pryor, is a relatively short and succinct discussion of the question presented and relevant legal authority that led the court to its interpretation of the FHA and its ultimate decision.⁶⁹ The discussion begins with the court's statutory interpretation of the FHA to determine its plain meaning. Under the FHA, it is "unlawful to 'discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of . . . sex.'"⁷⁰ Based on the court's statutory interpretation of this provision's plain meaning, along with support from *Burrage v. United States*,⁷¹ which held that "because of" and "based-on" within statutory language dictates "but-for causality,"⁷² it held that a tenant or potential homebuyer is protected under the FHA from being treated differently or less favorably in their housing terms, conditions, or privileges if she would not have received that treatment but-for her sex.⁷³

After determining the plain meaning of the statutory provision at issue, the court moved forward with its interpretation of the FHA by looking at cases that analyzed and compared the similar Title VII

65. *Id.*

66. *Fox*, 4 F.4th at 1295.

67. *Id.* at 1295 (citing *Georgia State Conference of the NAACP v. City of LaGrange, Georgia*, 940 F.3d 627, 631 (11th Cir. 2019)).

68. *Id.*

69. *Id.* at 1293.

70. *Id.* at 1296 (quoting 42 U.S.C. § 3604(b)).

71. 571 U.S. 204 (2014).

72. *Fox*, 4 F.4th at 1296 (quoting *Burrage*, 571 U.S. at 213).

73. *Id.* at 1296.

language. Other circuits that have faced the same problem have adopted this approach, so the Eleventh Circuit followed suit.⁷⁴ It relied heavily on the Supreme Court of the United States holding in *Meritor*,⁷⁵ where the court “ruled that ‘without question’ sexual harassment is a form of sex discrimination within the meaning of Title VII’s nearly identical prohibition on ‘discrimination . . . because of . . . sex.’”⁷⁶ Judge Pryor noted that the Supreme Court in *Meritor* actually adopted some of the Eleventh Circuit’s reasoning from its decision in *Henson v. City of Dundee*.⁷⁷ In *Henson*, a female officer employed by the Dundee Police Department brought a Title VII claim against the City of Dundee, alleging that she had been sexually harassed while on the job. The plaintiff alleged three types of sexual harassment: (1) the chief of the police department created a hostile and offensive work environment for the women working at the police station; (2) her resignation was essentially a constructive discharge based on her sex; and (3) the chief of the police department prevented the plaintiff from attending the police academy because she refused to engage in sexual relations with him.⁷⁸

In that opinion, the court “held that ‘a hostile or offensive atmosphere created by sexual harassment can, standing alone, constitute a violation of Title VII.’”⁷⁹

The court further explained its rationale by stating “that a ‘pattern of sexual harassment inflicted upon an employee because of her sex is a pattern of behavior that inflicts disparate treatment upon a member of one sex with respect to terms, conditions, or privileges of employment.’”⁸⁰ So, while Title VII doesn’t explicitly state that sexual harassment in the workplace is prohibited, since sexual harassment constitutes differential and less favorable treatment based on one’s sex, it is nevertheless actionable under the statute. The court noted that, since these two noteworthy decisions have been handed down, it has continuously ruled that sexual harassment equates to unlawful sex discrimination under Title VII, as long as the plaintiff can prove that she would not have been harassed but-for her sex.⁸¹ Based on this analysis of Title VII and its similarities to the FHA in its language and

74. *Id.*

75. 477 U.S. 57.

76. *Fox*, 4 F.4th at 1296 (quoting *Meritor*, 477 U.S. at 64).

77. *Id.*

78. *Henson*, 682 F.2d at 899–900.

79. *Fox*, 4 F.4th at 1296 (quoting *Henson*, 682 F.2d at 902).

80. *Id.* (quoting *Henson*, 682 F.2d at 902).

81. *Id.* at 1297.

prior applications, the Eleventh Circuit concluded that the language of “the FHA prohibits sexual harassment.”⁸²

The court ultimately held that, in the Eleventh Circuit, both types of sexual harassment, quid pro quo and hostile housing environment, are actionable under the FHA.⁸³ Additionally, the plaintiff must prove that her sex was the “but-for” cause of the harassment.⁸⁴ The court noted that, while sexual harassment is not explicitly prohibited in the statutory language of the FHA, the statute has a very broad purpose.⁸⁵ Drafting the language of the FHA in such a broad, wide-reaching way may have been inadvertent, or it may have been with specific intent.⁸⁶ Regardless, the Eleventh Circuit’s broad statutory interpretation is justified. As a result, the FHA’s prohibition of discrimination based on sex includes sexual harassment within the housing context.⁸⁷

B. Court’s Discussion of the Florida FHA

Despite the fact that Ms. Fox’s complaint alleged a violation of the Florida FHA and the federal FHA, the Eleventh Circuit’s opinion did not mention an analysis of the Florida statute or whether it provides a cause of action for sexual harassment. However, it can reasonably be inferred that, since the language is nearly identical to that found in the FHA, the court’s analysis and application would be similar, if not the same.⁸⁸ That being said, it is possible that a claim for sexual harassment, either quid pro quo or hostile environment, will be actionable under the Florida FHA as sex discrimination.

C. Court’s Discretion to Remand

Since the order granting the defendants’ motions to dismiss was based on the district court’s finding that the FHA did not provide for a sexual harassment cause of action, the Eleventh Circuit vacated that ruling and remanded the case to the district court to be re-evaluated

82. *Id.* at 1296.

83. *Id.* at 1297.

84. *Id.*

85. *Id.* at 1297 n.8 (quoting *Ga. State Conf.*, 940 F.3d at 631).

86. “‘The language of the FHA is broad and inclusive,’ ‘prohibits a wide range of conduct,’ ‘has a broad remedial purpose,’ and ‘is written in decidedly far-reaching terms.’” *Ga. State Conf.*, 940 F.3d at 631–32 (quoting *City of Miami v. Wells Fargo & Co.*, 923 F.3d 1260, 1278–79, examining the legislative history of the FHA shows that Congress attempted to reach a group of broad social ills by allowing suits by a large group of potential plaintiffs and prohibiting a wide range of conduct).

87. *Fox*, 4 F.4th at 1297.

88. *Bhogaita*, 765 F.3d at 1285.

based on its new holding.⁸⁹ Rather than deciding for itself whether Ms. Fox alleged sexual harassment that was sufficiently within the FHA's unlawful conduct, the court used its discretion given to them by *Singleton v. Wulff*⁹⁰ to remand it to the district court.⁹¹ The Supreme Court of the United States in *Singleton* held that the court of appeals has discretion to decide which questions it wants to hear and resolve for the first time on appeal.⁹² Based on the individual facts of each case, the court may choose to either hand down a ruling on the issue, or remand the case to the district court to rule on the issue with further guidance.⁹³ In this case, the Eleventh Circuit did not feel the need to resolve the issue, and felt that the district court would be better-equipped to tackle the question.⁹⁴

V. IMPLICATIONS

As this question was one of first impression in the Eleventh Circuit, the holding in *Fox* puts it in a group with at least four of its sister circuits throughout the United States, which have interpreted the FHA to provide a cause of action for sexual harassment within the housing environment.⁹⁵ Every other circuit that has faced the same question has ruled affirmatively, prohibiting both quid pro quo and hostile environment sexual harassment under the FHA.⁹⁶ And now the Eleventh Circuit joins, providing tenants and renters a means of recovery if one is sexually harassed by their landlord whether in the renting or selling process, or during their stay at the respective property or dwelling. Within the Eleventh Circuit's jurisdiction, landlords can no longer proposition their tenants with some kind of

89. *Fox*, 4 F.4th at 1297.

90. 428 U.S. 106 (1976).

91. *Fox*, 4 F.4th at 1297.

92. *Singleton*, 428 U.S. at 121.

93. *Id.*

94. *Fox*, 4 F.4th at 1297 n.9. "We acknowledge Ms. Fox's argument on appeal that her second amended complaint adequately alleged violations of the FHA's prohibition on sexual harassment. We believe, however, that the district court is best suited to address this question in the first instance."

95. See *United States v. Hurt*, 676 F.3d 649, 654 (8th Cir. 2012) (holding that FHA provides cause of action for hostile housing environment and quid pro quo sexual harassment); *DiCenso*, 96 F.3d at 1008 (holding that sexual harassment constitutes sex discrimination under the FHA); *Honce*, 1 F.3d at 1090 (holding that sexual harassment claims are actionable when they create a hostile housing environment and interferes with the victim's use and enjoyment of the premises); *Hall*, 7 F. App'x. at 689 (holding that a sexual harassment claim under the FHA is analyzed the same way as a sexual harassment claim under Title VII).

96. *Fox*, 4 F.4th at 1295–96.

sexual arrangement in exchange for a lower rent or other types of benefits related to their housing situation.⁹⁷ Often times, these types of instances stem from the landlord's relatively superior position of power, as well as the unequal bargaining power between the two parties. Tenants and renters also will no longer have to put up with a landlord's continuous sexually inappropriate behavior, comments, or propositions in fear of being evicted in retaliation.

Landlords, property owners, and managers now have the absolute duty to refrain from sexually harassing or discriminating against their tenants or potential tenants, as well as the responsibility to ensure that their employees and subordinates also refrain from those types of actions. If an employee of a property owner or landlord engages in unlawful conduct under the FHA, both the employee and the landlord or property owner can be held liable for the prohibited conduct.⁹⁸ This will no doubt have implications for the hiring process of those that landlords or property owners choose to have work for them, like adopting a more careful and strict hiring process, for example.⁹⁹

It is likely that the Eleventh Circuit's decision in *Fox* will have a continued unifying effect on other United States circuits. Going forward, it is probable that any circuit that has not adopted the same holding, (every U.S. circuit besides the Seventh, Eighth, Ninth, Tenth, and Eleventh) and is faced with the same question as presented here, will rule in the same way. Further, just as the interpretation of Title VII has evolved over time to broaden the scope of its application, the FHA will also likely continue to broaden in the scope of its application since the two statutes are so similar in purpose and construction. In fact, since the language of the FHA is even broader than Title VII's, it is reasonable to believe that the FHA may even reach a broader coverage than its counterpart.¹⁰⁰

The holding in *Fox* represents a general trend in the United States towards fighting for the rights of those who have fallen victim to sexual assault and sexual harassment.¹⁰¹ This can be seen in the growing #MeToo movement that has garnered much of the country's attention and admiration within the past few years.¹⁰² Furthermore, there has

97. Dave Linn, Annotation, *Sexual Harassment by Landlord*, 3 Am. Juris. Proof of Facts 3d 581 § 1 (1989).

98. Fuhr, *supra* note 3, at § 10.

99. *Id.* § 3.

100. Robert G. Schwemm and Rigel C. Oliveri, *A New Look at Sexual Harassment Under the Fair Housing Act: The Forgotten Role of 3604(c)*, 2002 WIS. L. REV. 771 (2002).

101. Fuhr, *supra* note 3, at § 2.

102. Noveck and Dale, *supra* note 1.

been an overall heightened focus on fighting for the rights and freedoms of all individuals throughout the nation—specifically those groups who have been marginalized in one way or another.¹⁰³ The days of individuals sitting by and idly watching injustices occur are over. People are now motivated more than ever to fight for what is right. While the fight for the civil rights of every individual in the nation is far from over, the Eleventh Circuit’s holding that sexual harassment is now actionable under the FHA is a step in the right direction. It now gives a previously excluded group recourse for the injustices they may face going forward, which is what many hope to see in other areas of the United States’ justice system.

103. See Ralph Ranalli, *Americans’ attitudes toward civil rights and government are more aligned since pandemic, new Carr Center polling shows*, HARVARD KENNEDY SCHOOL, (July 19, 2021), <https://www.hks.harvard.edu/faculty-research/policy-topics/democracy-governance/americans-attitudes-toward-civil-rights-and>.